

1 BEFORE THE SHORELINES HEARINGS BOARD
2 STATE OF WASHINGTON

3 VALERO LOGISTICS OPERATION, LP,
4 et.al.,

5 Petitioners,

6 v.

7 CITY OF TACOMA and PIONEER CAY
8 DEVELOPING, LLC.,

9 Respondents.

SHB NO. 06-001

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

9 A hearing was held in the above matter on June 8 and 9, 2006. The first day of the
10 hearing was in Tacoma, and the second day was at the Board's Office in Lacey, WA. The
11 Shorelines Hearings Board was comprised of the following members: William H. Lynch, Chair,
12 Kathleen D. Mix, Andrea McNamara Doyle, Judy Wilson, Mary Alyce Burleigh¹, and Mitch
13 Brown. Administrative Appeals Judge, Kay M. Brown presided over the hearing. Randi
14 Hamilton, with Gene Barker and Associates of Olympia, Washington, provided court reporting
15 services. The Petitioners, Valero Logistics Operation, LP, Globe Machine Manufacturing
16 Company, International Longshoreman and Warehouse Union, Marine Industries, NW, Local
17 26-Puget Sound Metal Trades and Simpson Investment Company (Petitioners) were represented
18 by their attorney Carolyn A. Lake. Pioneer Cay Development, LLC (Pioneer Cay) was
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21 ¹ Mary Alyce Burleigh had to miss portions of the hearing due to scheduling conflicts, but did review the entire
record for the hearing.

1 represented by its attorney, William T. Lynn. City of Tacoma appeared through its attorney,
2 Assistant City Attorney Kyle J. Crews.

3 The Board received sworn testimony of witnesses, exhibits, and argument on behalf of
4 the parties. The first day of the hearing, the Board also conducted a site visit. Having fully
5 considered this record, the Board enters the following:

6 FINDINGS OF FACT

7 I.

8 Pioneer Cay proposes the development of an eight-story mixed use commercial and
9 residential building on the east side of the Thea Foss Waterway (Waterway) in the City of
10 Tacoma. The Waterway is located below a steep bluff at the edge of the City of Tacoma's
11 central business district and at the head of Commencement Bay. The area is visible from much
12 of the City's downtown core. Historically, the Waterway has had industrial uses due to the
13 proximity of the Port of Tacoma immediately adjacent to the east. In the 1990's the Waterway
14 became the focus of intense planning efforts by the City of Tacoma aimed at redevelopment and
15 revitalization of the area. The Thea Foss Waterway Design and Development Plan (Thea Foss
16 Plan) was created as a result of the planning effort. *Testimony of Allen, McEntee, Exs. R-1, R-6,*
17 *Thea Foss Plan.*

18 II.

19 The Thea Foss Plan primarily addresses the west side of the Waterway where the most
20 major changes in planning have been made. It also addresses the east side of the Waterway in a

1 separate chapter. The east side chapter of the Thea Foss Plan recognized the importance of the
2 existing commercial and industrial uses currently located in this area, but also recognized that
3 changes in uses in the area could occur in the future. Even in the heavily industrial east side, the
4 City encourages residential and water-oriented uses, and promotes public access and recreational
5 uses where it does not conflict with industrial activities due to safety or security hazards. *Thea*
6 *Foss Plan at 73-79..*

7 III.

8 The Pioneer Cay building is designed to be oriented toward the Waterway. The bottom
9 two levels of the building are planned for water-related commercial uses. The upper six floors
10 are to be used for a total of 74 residential condominium units. The proposal includes a 20-foot
11 wide by 355-foot long public esplanade, and a park along the northerly 140 feet of the site on the
12 Foss Waterway. It also includes off-street parking in a multi-story parking garage located across
13 the street from the building. A sky bridge is proposed to connect the structures. Additional
14 parking spaces will also be provided in the street right of way. Total parking for the project will
15 be approximately 268 parking stalls. *Testimony of Magoon, Ex. R-1, R-6, R-6A, R-6B, R-6C, R-7,*
16 *R-10, R-14.*

17 IV.

18 The proposed project site for the building, esplanade and park (herein referred to as the
19 “project site”) is located west of East D Street and south of East 3rd Street. The proposed parking
20 garage site is located off the project site on the east side of East D Street. The project site is

1 within 200 feet of the ordinary high watermark (OHWM) of the Thea Foss Waterway, but the
2 parking garage is located outside of the shoreline area. All improvements on the project site are
3 located landward of the OHWM. *Testimony of Magoon, Exs. R-1, R-6, R-6A, R-6B, R-6C, R-7,*
4 *R-10, R-14.*

5 V.

6 The project site is located in an urban shoreline environment, designated the S-8 Thea
7 Foss Waterway Shoreline District in the Tacoma Shoreline Master Program (TSMP). The
8 proposed parking garage is outside of the shoreline environment and is zoned for industrial use.
9 The project site has been for sale for a number of years. *Testimony of Magoon, Allen, Exs. R-1,*
10 *R-6, R-6A, R-14.*

11 VI.

12 The adjacent businesses on both the north and south side of the project site are major
13 petroleum facilities that receive, store, and distribute large quantities of petroleum products.
14 Petroleum products are received at these facilities through the Olympic Pipeline, by railroad, and
15 from the water on barges and tanker ships. The products leave the site in tank trucks. *Testimony*
16 *of Arrasmith, Stowell, Exs. P-16, P-17, P-21, R-1, R-6, R-14.*

17 VII.

18 The business to the north, Shore Terminals LLC/Valero (Valero), distributes over one
19 million gallons of fuel daily from this site.² It houses 15 storage tanks with a capacity of

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21 ² Valero is one of the Petitioners in this appeal.

1 377,000 barrels of product. Three trains service the Valero facility daily via a spur track which
2 extends along the east side of East “D” Street. Approximately 154 trucks leave the site each day.
3 The Valero facility operates 24 hours per day. The Valero site is one of only two distribution
4 areas in the Puget Sound that can take pipeline deliveries. The only other option for truckers to
5 get fuel product is in Bellingham. *Testimony of Arrasmith, Stowell, Exs. P-16, P-17, P-21, R-1,*
6 *R-6, R-14.*

7 VIII.

8 Other heavy industrial uses located in the vicinity of the project site on the east side of
9 the Waterway include a marine shipbuilding and repair business, a metal fabrication facility, and
10 a bulk chemical storage facility. The Waterway itself is approximately 700 feet wide in the
11 vicinity of the project site. Across the Waterway on the west side are a variety of uses, including
12 a marina, commercial and office uses, and a public park. *Testimony of Slater, Bamford, Ren,*
13 *Exs. R-1, R-6, R-14.*

14 IX.

15 The adjacent industrial uses generate significant noise levels on a 24 hour/seven day a
16 week basis in the area of the project site. The ambient noise level at the site is common for an
17 industrial area. At times, the noise level exceeds that which would be appropriate for residential
18 uses. Sources of excessive noise in a 24 hour test period on the site included train whistles,
19 tanker trucks, and barge activity. The noise levels anticipated to impact the interior of the
20 proposed residential condominiums could be reasonably attenuated through the use of special

1 windows (Rated STC 40 or higher), resilient channels on the inside of all walls, and acoustical
2 linings in the ducts connected to the outside. Barge loading produced the loudest level of noise,
3 72 dBA, during the test period. Downtown Seattle often is in the 70 to 75 dBA range. The site
4 was at or below 50 dBA for one-half of the test period. A level of 55 dBA is considered to be a
5 “quiet environment.” The noise level adjacent to the site is roughly 11 to 12 decibels higher than
6 what is allowed for a residential area. The noise levels on the outside of the condominiums, such
7 as on the decks, would remain unacceptably high for residential use at certain times. At other
8 times, however, the noise levels would be low enough to allow comfortable use of the decks.
9 This is consistent with many other condominiums in urban areas. *Testimony of Wallace, Lilly, P-*
10 *39, R-1.*

11 X.

12 The industrial uses in the vicinity of the project site pose increased safety and health
13 risks, unusual for a residential area. The neighboring petroleum storage and distribution
14 facilities have an inherent risk of fire and explosions because of the large amounts of flammable
15 and explosive products stored on the site. The Olympic pipeline also carries flammable material.
16 These industrial users in the area are highly regulated and subject to extensive fire safety and fire
17 suppression requirements. They are also required to have security plans, due to the possibility
18 that their facilities and related truck tanker traffic, could be a target for terrorist attacks. There is
19 no contention raised in this proceeding that the industries are not complying with the applicable
20
21

1 health and safety regulations. *Testimony of Baurichter, Chambers, Stohl, Exs. R-1, R-8, R-9, P-*
2 *40.*

3 XI.

4 Because of the regulations and practices in place, the risk of a fire or explosion occurring
5 at the neighboring petroleum facilities is low. If such a fire does occur, however, it has a high
6 risk of being extremely large and volatile. The radiant heat hazard footprint would impact the
7 entire project area. The presence of people in nearby buildings in the event of such a fire
8 changes the response plan of the firefighters called in to contain and suppress the fire and
9 increases their risks. Firefighters do not rush into the area now in the event of a fire, but if the
10 project is built, firefighters would want to ensure the building tenants were evacuated. *Testimony*
11 *of Baurichter, Chambers, Stohl, Exs. R-1, R-8, R-9, P-40.*

12 XII.

13 The City of Tacoma Fire Department submitted a written comment on the proposed Cay
14 project indicating that the building would not have any higher risk of fire than any other mixed
15 use building.³ The project proposal complies with all fire safety provisions required for a facility
16 of its type. It will be fully equipped with an automatic sprinkler system and standpipes, a fire
17 alarm system, and emergency fire department access systems. *Testimony of Magoon, Exs. R-8,*
18 *R-9.*

20 ³ The City Fire Department did express concern that lack of funding for marine firefighting could impact a fire in the
21 proposed building because of access issues on the water side of the building. *Ex. R-8.*

1 XIII.

2 East “D” Street is the primary access street for the proposed Pioneer Cay project. It
3 currently consists of two 14-foot wide travel lanes within an 80-foot right of way. Besides the
4 travel lanes, the rest of the road right of way contains a railroad corridor with one set of tracks,
5 two 2-foot wide trough gutters and a 22-foot paved/gravel shoulder on the west side of the street.
6 The road pavement is in poor condition.⁴ East “D” street lacks sidewalks and street lights.
7 Pioneer Cay is required, through conditions on the SDP, to construct curb, gutter, and driveways
8 abutting the project site, and to widen and pave East “D” Street abutting the site. *Testimony of*
9 *Kingsolver, Magoon, Johnson, Exs. R-1, R-6, R-6N, R-9, R-10.*

10 XIV.

11 The current volume of traffic on East “D” Street is low, and consists primarily of trucks.
12 It is anticipated that the proposed Pioneer Cay project will generate an increase in traffic of 1,147
13 daily trips, and 170 evening peak hour trips. While this is a significant increase compared to
14 current traffic volumes on East “D” Street, the total vehicle volume, even with the expected
15 increase, is relatively low and well below the capacity of the street and nearby intersections. The
16 proposed Pioneer Cay project will also generate some increase in pedestrian use of East “D”
17 Street. The highest estimate of pedestrian usage is 400 daily trips off the project site.
18 Approximately 80 percent of these trips are predicted to be to the parking garage via the sky
19 bridge. The lack of nearby off-site destinations and the lack of sidewalks will likely discourage

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21 ⁴ The City rates the pavement in this area as “failed.” *Ex. R-10.*

1 off-site pedestrian trips other than to the parking garage. Although conditions for pedestrian
2 traffic are far from ideal on East “D” Street, the wide shoulder provides a sufficient area for
3 pedestrians to walk. Danger to pedestrians from trains is low, despite the presence of the train
4 track. This is because the line is a spur line and ends just beyond the Cay project, only three
5 trains per day use the line, the trains are short, and the trains are moving at pedestrian walking
6 speed. Striping an area for pedestrians to walk in the right of way on East “D” street would
7 increase the safety of pedestrian traffic, although dim lighting would remain a problem during
8 night-time hours. *Testimony of Kingsolver, Reimann, Magoon, Johnson, Wise, Exs. R-1, R-6L,*
9 *R-9, R-10, P-12.*

10 XV.

11 Pioneer Cay initially applied for a shoreline substantial development (SDP) and a
12 conditional use permit (CUP) in the fall of 2004. The City required Pioneer Cay to submit an
13 environmental checklist because the project was subject to review pursuant to the State
14 Environmental Policy Act (SEPA). The project, as proposed, required both a SDP and CUP
15 because Pioneer Cay planned to allow non-water-oriented commercial uses in their mixed use
16 building. Subsequently, Pioneer Cay modified its proposal by limiting the planned commercial
17 uses in the first two floors to water-oriented commercial uses only. Because both water-oriented
18 commercial uses and residential uses are permitted uses in the S-8 Shoreline District, the project
19 proceeded as an application for a SDP. *Testimony of Magoon, Exs. R-1, R-6, R-6A, R-9, R-10, R-*
20 *12, R-13, R-14, R-18, R-18A, R-19.*

1 XVI.

2 Pioneer Cay also sought the reduction of the required front yard setback along the site's
3 East "D" Street frontage from 20 feet to 10 feet in order to increase the separation between the
4 building and the waterfront, and to provide additional area for the development of the esplanade
5 and for landscaping. *Testimony of Magoon, Exs. R-1, R-6, R-6A, R-6B, R-9, R-10.*

6 XVII.

7 Pioneer Cay's SDP application was subjected to extensive review by the City, both
8 through the shoreline and SEPA review process. The review involved sending notice of the
9 application to internal City departments, other agencies with an interest, and then public notice.
10 The public notice included notice to the neighboring property owners and the neighborhood
11 council. A public meeting was advertised and held. Many comments were received, both
12 through the public meeting and the SEPA process. The comments were responded to by the
13 applicant and the City. The project design was changed twice during the process, and the SEPA
14 checklist was also revised. *Testimony of Magoon, R-1 through R-22.*

15 XVIII.

16 The City issued a SEPA determination of environmental nonsignificance (DNS) and
17 approved the SDP on June 23, 2005. Both decisions were appealed to the City's Hearing
18 Examiner. Following an evidentiary hearing, the Hearing Examiner affirmed both decisions.
19 The Hearing Examiner's decision was then appealed to this Board. *Testimony of Magoon, R-1,*
20 *R-6, R-7.*

1 XIX.

2 The SDP, at the time of its appeal to this Board, contained the requirement that Pioneer
3 Cay would provide written notice to purchasers of units in the building as to the industrial nature
4 of the surrounding environment and the impacts that it could have on the enjoyment of their
5 residences. At the hearing, Pioneer Cay also offered to support and not oppose a resolution by
6 the City to make the noise standards in the area of the Cay project consistent with the zoning.
7 *Testimony of Wallace, Cohen, Exs. P-39, R-1, R-6, R-9.*

8 XX.

9 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

10 CONCLUSIONS OF LAW

11 I.

12 The Board has jurisdiction over this matter pursuant to RCW 90.58.180. Petitioners have
13 the burden of proof regarding the City's approval of the Shoreline Substantial Development
14 Permit (SDP) because Petitioners are requesting review of the granting of this permit. RCW
15 90.58.140(7). The scope and standard of review for this matter is *de novo*. WAC 461-08-
16 500(1).

17 II.

18 The issues as established in the Second Pre-hearing Order in this appeal are:

- 19 1. Does the SDP at issue comply with RCW 90.58, including the policies set out
20 therein?

2. Is the SDP consistent with the TSMP including, but not limited to, provisions pertaining to parking, adjacent uses, water orientation, front yard set-backs, and views?
3. Is the SDP consistent with the general policy statements in the Thea Foss Plan?
4. Whether the policy statements in the Thea Foss Plan can control the specific regulations of the TSMP?
5. Does the SDP, as approved, comply with TMC Ch. 13.06 (zoning), including, but not limited to, requirements related to compatibility with existing uses, parking, stormwater treatment, light, glare, noise, traffic, a pedestrian bridge, and emergency vehicle circulation requirements?
6. Was the application for the SDP complete?
7. Whether the City complied with SEPA prior to issuing the permit?
8. Was the City's DNS proper?
9. Was the project illegally "piecemealed" in violation of the SMA and SEPA?
10. Should the City have required a variance for the project due to the front yard set-back?
11. Whether the SDP is consistent with the comprehensive plan?

III.

A. SDP's Compliance with the Shoreline Management Act (SMA), the Tacoma Shoreline Master Program (TSMP) and the Thea Foss Waterway Design and Development Plan (Thea Foss Plan) (Issues 1, 2, 3 and 4.)

Petitioners' primary contention in this appeal is that Pioneer Cay's proposed project, with its mixed commercial and residential use, is incompatible with the surrounding industrial uses. They argue that such incompatibility violates the SMA, the TSMP, and the Thea Foss Plan. Pioneer Cay and the City respond that both commercial and residential uses are a permitted use in the S-8 district and that this designation as a permitted use controls over policy statements. The Board concludes, based on the analysis set out below, that the City made a policy decision to allow residential and industrial uses to coexist in the S-8 district to achieve their goal of redevelopment of the Waterway. This policy decision includes acceptance of some level of

1 incompatibility of uses between a residential condominium and surrounding heavy industrial
2 uses. The City has required, however, through language in the Thea Foss Plan, that
3 incompatibility beyond the inherent potential conflict between residential and industrial uses
4 must be addressed through design and conditioning of the proposed project. The Pioneer Cay
5 project as designed and conditioned by the City, with the additional conditions imposed by the
6 Board through this order, minimizes the potential conflict, and is consistent with the SMA, the
7 TSMP, and the Thea Foss Plan.

8 IV.

9 Commercial and residential uses are allowed outright in the S-8 District under the TSMP.
10 The TSMP pertaining to the S-8 District states:

11 The following uses and development activities shall be permitted, subject to the issuance
12 of a Substantial Development permit, if required:

13 3. Commercial, water-oriented, upland, or over water.

14 15. Residential; upland location only . . .

15 TMC 13.10.110.D.

16 Therefore, the Pioneer Cay project, which involves an eight story building, the first two
17 of which are to be used for water-oriented commercial uses, and the upper six floors which are to
18 be used for residential condominiums, is one of the allowed uses for the S-8 Shoreline District.

V.

1. Compliance with the policies of the SMA

Petitioners contend that Pioneer Cay’s proposed use, particularly the residential portion of that use, violates the policies of the SMA. Petitioners point to language in the SMA that identifies “industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state” as one of several uses identified as priority uses. RCW 90.58.020(7).

VI.

The SMA policies also, however, give priority to increasing “public access to publicly owned areas of the shorelines” and “recreational opportunities for the public in the shoreline.” RCW 90.58.020(5),(6). The policies of public access and recreational opportunities are furthered through the plans for the development of a waterside park and esplanade for the public as part of the Pioneer Cay development. Further, the Board has recognized that there is a presumption that a use that is consistent with specific shoreline use regulations is consistent with shoreline policies. *Ackerson v. King County*, SHB No. 95-26 (March 19, 1996)(CL VII). Therefore, absent a showing by Petitioners that the Pioneer Cay project is inconsistent with the TSMP, the project is consistent with the overarching policies of the SMA.

VII.

2. Compliance with the TSMP and Thea Foss Plan – compatibility of adjacent uses

Petitioners argue that the Pioneer Cay project is inconsistent with the Thea Foss Plan.⁵

Pioneer Cay responds that local governments, when reviewing a project, must base their review on applicable development regulations, and that it is only in the absence of an applicable regulation that the government can utilize an adopted comprehensive plan for project review. RCW 36.70B.030. Pioneer Cay also cites Washington cases pertaining to the relationship between development regulations and plans for the proposition that the regulations are determinative as to allowed use, and that, in the case of a conflict between such regulations and underlying comprehensive plans, the regulations prevail. *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn. 2d 861, 873-874, 947 P.2d 120 (1997).

VIII.

In this case, there is no need to establish a hierarchy between the general policy statements in the Thea Foss Plan and the specific S-8 District use regulations in the TSMP, because the policy statements and specific S-8 Use regulations are not in direct conflict, and can be harmonized. It is an overarching principle of statutory construction that related statutory and regulatory provisions should be read as complementary rather than conflicting whenever

⁵ The City has adopted the Thea Foss Plan as an element of the TSMP, and Ecology has reviewed and approved it. Therefore, the question of the Pioneer Cay development's compliance with the Thea Foss Plan is properly before the Board. See TMC 13.10.110 J, Thea Foss Plan, *Faben Point Neighbors v. City of Mercer Island*, SHB 98-63 (May 5, 1999)(Summary Judgment of Dismissal for Lack of Jurisdiction).

possible. *Waste Mgmt. Of Seattle, Inc. v. Utils. Transp. Comm's*, 123 Wn. 2d 621, 869 P. 2d 1034, 1039 (1994), *Philippides v. Bernard*, 151 Wn. 2d 376, 385, 88 P. 3d 939, 945 (2004), citing *State v. Wright*, 84 Wn. 2d 645, 650, 529 P. 2d 453 (1974).

IX.

The TSMP authorizes residential and commercial uses in the S-8 District, as well as industrial uses. TMC 13.10.110.D.3. New water-dependent or water-related industrial uses, however, are only allowed in the area on the east side of the waterway and north of the East 15th Street. TMC 13.10.110 D 9, 10. This is consistent with the vision set forth in the Thea Foss Plan, and the intent section of the TSMP.

X.

The Thea Foss Plan contains one chapter specifically addressing the east side of the Waterway. In this chapter, the East Side Concept is described. The City, through the language in the Plan explains its vision:

Existing commercial and industrial uses are valuable to the success of the waterfront and the economic life of our community. These businesses, coupled with other Waterway uses, can provide synergy that will continue to benefit Tacoma's economic prosperity. However, if change occurs, offering a variety of other mixed uses, these developments must be carefully designed to avoid conflicts that could arise between existing industrial uses and new development. Environmental clean-up of east side properties will allow the redevelopment of residential, marinas, water oriented commercial, retail and office uses.

Thea Foss Plan, p. 73. Later in the same east side chapter, the City "Encourages public access and interpretation where there are no conflicts with industrial activities due to safety or

1 security hazards.” *Id.* In that same chapter, in a section directed specifically at the Northeast
2 Commercial/Industrial District, the City again explains this vision:

3 It is intended that this area eventually will be used for, mixed commercial and marine
4 dependent industrial operations. Such uses are viewed as compatible with the proposed
5 redevelopment direction of the Waterway’s west side. Existing industrial uses in the area
are encouraged to continue their current operations until such time as market conditions
dictate a change in use.

6 Thea Foss Plan, p. 77. In the same Northeast section, the City states:

7 Industrial uses are valuable to the success of the waterfront. These industries, coupled
8 with other waterway uses, can provide synergy that will benefit the economic prosperity
of existing and new businesses. Avoid conflicts that arise between existing industrial
uses and new developments.

9 Thea Foss Plan, p. 79.

10 XI.

11 The Northeast Section of the Plan does not contain the word “residential.” Petitioners
12 point to the absence of a discussion of residential use in the Northeast Section as creating a
13 conflict with the TSMP, which allows residential use as an outright permitted use in the S-8
14 District, including the Northeast portion of the Thea Foss Waterway. The Board concludes that
15 this absence does not create an irreconcilable conflict. The Thea Foss Plan and the TSMP use
16 provisions can be harmonized by concluding that residential use is allowed throughout the S-8
17 district, but that it must be designed to avoid conflicts with industrial uses beyond the inherent
18 potential incompatibility that such uses have. The choice to allow these inherently incompatible
19 uses next to each other has been made by the City. There is nothing in the SMA, the TSMP, or

1 the Thea Foss Plan that allows the Board to deny the SDP based solely on the potential conflicts
2 among the residential and industrial users of the area.

3 XII.

4 The Petitioners have not identified any particular aspect of the Pioneer Cay project that
5 makes it potentially more incompatible with the neighboring industrial uses than any other
6 proposed residential use in this location. The thrust of their argument is that the heavy industrial
7 area of the Northeast Side of the Waterway is too noisy for people to live next door, and that the
8 streets in the area are not safe for pedestrian use. Their fear is that when people move in, they
9 will begin complaining to the City and regulatory agencies about their industrial neighbors, and
10 that this will ultimately result in heightened regulation of their industrial activities to the
11 detriment of their businesses. In support of their argument, the Petitioners state that Foss
12 Shipyards in Seattle had to modify its operations because of complaints from neighbors.

13 *Testimony of Slater.*

14 XIII.

15 The City and Pioneer Cay have made serious efforts to address industries' concerns. The
16 mixed-use building is oriented away from the industrial uses, and has been moved as far away
17 from the primary industrial objector as possible. A skybridge to an offsite parking garage is
18 included in the project design to avoid pedestrian/truck conflicts. The number of driveways
19 originally planned for the project was reduced from three to one for the same purpose. Pioneer
20 Cay also offered, at the hearing, to stripe an area for pedestrians to walk in the edge of the right

1 of way on East “D” street. To address concerns regarding noise impacts on the residential
2 condominiums, Pioneer Cay offered to use STC 40 rated windows, or higher, to use resilient
3 channels on all of the inside walls, and to acoustically line all ducts connecting to the outside.

4 XIV.

5 Most importantly, Pioneer Cay will provide notice on the title to buyers regarding the
6 industrial nature of the area in which they are purchasing, and the likely impacts that industry
7 will have on their use and enjoyment of their property. At the hearing, Pioneer Cay also
8 indicated that it would not oppose a resolution by the City to make the noise standards in the area
9 consistent with the zoning.

10 XV.

11 These accommodations are among those that a specific applicant can legitimately be
12 required to undertake to address the potential problems that may arise from allowing inherently
13 conflicting land uses to establish next to each other for purposes of redevelopment of an area of
14 the City. Since it is the City that has ultimately made this policy choice, the Board encourages
15 the City to take proactive steps to address health and safety issues that arise because of the
16 industry/residential interface, and to facilitate conflict resolution between the residential and
17 industrial users in a positive and constructive manner.

1 XVI.

2 3. Compliance with the TSMP and Thea Foss Plan – parking

3 The TSMP has several general regulations pertaining to parking in the shoreline area.
4 See TMC 13.10.175.3. a-i. However, Petitioners do not contend that any of these TSMP
5 provisions have been violated. Instead, Petitioners argue that the proposed number of parking
6 stalls does not conform to the requirements contained in TMC 13.06.510, and that parking must
7 be on-site as required by TMC 13.06.510⁶. TMC 13.06 is Tacoma’s zoning code. As addressed
8 below, the Shorelines Hearings Board has jurisdiction only over provisions of the zoning code
9 incorporated into the local shoreline master program and reviewed and approved by Ecology.
10 While the TSMP references the zoning provisions on parking as being applicable in the shoreline
11 districts, it does not incorporate these provisions into the TSMP. Therefore, the Board lacks
12 jurisdiction over this project’s compliance with parking requirements contained in the zoning
13 code. *Laccinole v. City of Bellevue*, SHB No. 03-025 (March 10, 2004).

14 XVII.

15 4. Compliance with the TSMP and Thea Foss Plan – view impacts and water orientation⁷

16 Petitioners cite no provisions of the TSMP or Thea Foss Plan which prohibit an eight-
17 story building or a three-story parking garage in the urban shoreline district or address
18

19 ⁶ The Petitioners also argue that parking violates TMC 13.10.110.H.4.a by not being within a structure. The cited
20 provision applies only to parking provided on the west side of the Waterway and therefore is not applicable to the
21 Pioneer Cay development on the east side of the Waterway. The Board notes, however, that the Pioneer Cay
Development provides for in structure parking.

⁷ The issue of front yard setback is addressed in Section F of this decision.

1 requirements related to water orientation. Further, Petitioners presented little or no evidence
2 regarding view impacts or water orientation to the Board. The Petitioners have failed to meet
3 their burden of proof that the Pioneer Cay project violates the TSMP because of visual impacts
4 or water orientation.

5 XVIII.

6 B. SDP's Compliance with the City of Tacoma's Zoning regulations, TMC 13.06, and
7 Comprehensive Plan (Issues 5 and 11)

8 Petitioners contend that the Pioneer Cay project does not comply with the City's zoning
9 regulations and comprehensive plan, and asks the Board to rule on this compliance. The Board
10 does not have jurisdiction over a shoreline project's compliance with the local zoning code and
11 comprehensive plan unless the zoning provisions are explicitly incorporated into the shoreline
12 master program. *Laccinole et.al., v. City of Bellevue, et. al.*, SHB No. 03-025, (Order Granting
13 Summary Judgment and Order of Remand) (March 10, 2004); *Faben Point Neighbors et. al.*
14 *v. City of Mercer Island, et. al.*, SHB No. 98-63 (Summary Judgment of Dismissal for Lack of
15 Jurisdiction) (May 5, 1999).

16 XIX.

17 Here, Petitioners do not point to any language in the TSMP that specifically incorporates
18 the provisions of the zoning code and the comprehensive plan. There are places in the TSMP
19 where specific provisions of the zoning code are referred to, for instance where parking in the
20 shoreline areas is subject to the zoning code requirements for parking. See TSMP 13.10.175.3.a.
21 However, these references do not establish that the underlying zoning designations have been

1 incorporated into the TSMP. Instead, the TSMP language merely reflects the fact that
2 development must comply with both the zoning code and the TSMP requirements, which overlay
3 the zoning. This type of language, in the words of the Board in *Faben Point Neighbors*, reflects
4 the "simultaneous governance of one project by several bodies of law and not the incorporation
5 of one body of law into another." *Faben Point Neighbors* at CL 4. The Board concludes that
6 Issues 5 and 11 are outside of its jurisdiction.

7 XX.

8 C. Completeness of the SDP application (Issue 6)⁸

9 Petitioners contend that the Pioneer Cay application was incomplete because no SEPA
10 review was conducted for the pedestrian bridge or garage structure. While the Pioneer Cay
11 proposal did not initially include a proposed off-site garage structure accessed by a pedestrian
12 bridge, this structure was added in response to public comments. The change was reflected in a
13 revised SEPA checklist, and the City's Determination of Nonsignificance (DNS), which
14 describes the proposal as including parking in an off-site parking structure accessed via a
15 pedestrian bridge. *Exs. R-7, R-9, R-10*. The DNS was sent to all departments and agencies with
16 jurisdiction, and additional entities including the Petitioners' attorney and several of the

17 ⁸ Issue 6, as it is worded, appears to challenge the completeness of the SDP application itself, and not the SEPA
18 review. However, the argument in Petitioners' brief is focused on inadequate SEPA review and therefore it is this
19 argument that is addressed in the body of this decision. To the extent the Petitioners are arguing the SDP application
20 itself was inadequate, the Board also rejects this argument. While the Pioneer Cay proposal did evolve as it went
21 through the City's review and permitting process, the purpose of this evolution was to respond to concerns raised
through the process. Unlike the application in *Luce v. City of Snoqualmie*, SHB No. 00-034 (2001), the project as
ultimately approved by the City was final and complete, and contained sufficient detail to enable the local
government and the board to determine consistency with the policies set forth in the SMA, implementing regulations
and Shoreline Master Programs. *Hayes v. Yount*, 87 Wn.2d 280, 295, 552 P.2d 1038 (1976).

1 Petitioners. The Petitioners offer no evidence or argument why the process as described above
2 does not comply with the requirements of SEPA.

3 XXI.

4 D. SDP's compliance with SEPA (Issues 7 and 8)

5 The City's decision to approve the SDP issued for the Pioneer Cay project was subject to
6 review under SEPA, Ch. 43.21C RCW. Pursuant to SEPA, the City was required to make a
7 threshold determination on whether or not the Pioneer Cay proposal would have a significant
8 impact on the environment. The City concluded that it would not, and issued a DNS. The
9 Petitioners challenge the completeness of the SEPA checklist and the correctness of the City's
10 DNS.

11 XXII.

12 The Shorelines Hearings Board reviews the City's SEPA determination of
13 nonsignificance under a "clearly erroneous" legal standard. *Norway Hill Preservation and*
14 *Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 272-274, 552 P.2d 674 (1976). "A
15 finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court
16 on the entire evidence is left with the definite and firm conviction that a mistake has been
17 committed." *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn.App. 515, 523, 704 P.2d
18 1242 (1985).

1 XXIII.

2 Petitioners argue the City failed to adequately consider environmental impacts prior to
3 issuing the SEPA DNS. Their primary argument is that the project's compatibility with the
4 surrounding industrial environment was not adequately addressed. The Petitioners first contend,
5 as a procedural matter, that the SEPA checklist was inadequate. In fact, the checklist and revised
6 checklist do disclose the nature of the surrounding area. *Exs. R-10, R-14*. Further, the SEPA
7 process allows the government decision-maker to rely on a wide variety of information in
8 addition to the initial checklist in making its threshold determination. *Brown v. City of Tacoma*,
9 30 Wn. App 762, 765-766, 637 P.2d 1005 (1981)(citing WAC 197-11-330(1)). The record
10 before the Board reflects an extensive review and consideration by the City, including
11 consideration of an initial SEPA checklist, a revised SEPA checklist, comments from various
12 departments in the City, comments from agencies and individuals outside of the City, both in
13 writing and provided at public hearings, and expert analysis on certain key issues such as traffic.
14 In light of this extensive record, any inclusions or omissions of material from the Environmental
15 Checklist are not controlling on the issue of whether the decision to issue a DNS was clearly
16 erroneous. *Echo Bay Community Association v. Pierce Co.*, SHB No. 05-027 (April 14,
17 2006)(CL 4).

18 XXIV.

19 Petitioners' substantive challenge to the City's DNS is based on their contention that
20 there are impacts to the environment such as noise, traffic/pedestrian issues, light, glare, and
21

1 safety issues that should have been addressed through the SEPA process. The problem with
2 Petitioners' argument is that SEPA requires an agency to consider impacts from a proposal on
3 the surrounding environment, and not the reverse. See RCW 43.21C.031(1) ("An environmental
4 impact statement . . . shall be prepared on proposals for . . . major actions having a probable
5 significant, adverse environmental impact."); WAC 197-11-330(1) ("In making a threshold
6 determination, the responsible official shall (b) Determine if the proposal is likely to have a
7 probable significant adverse environmental impact . . ."). Here, the environmental impacts
8 identified by Petitioners are primarily impacts of the surrounding industrial environment on the
9 proposed project and not impacts of the project on the surrounding environment. Petitioners cite
10 no legal authority for making a determination of significant impact based on impacts to a
11 proposal from the surrounding environment. Further, the impacts industry fears will come from
12 the presence of a residential development in their area (complaints, increased regulations, stricter
13 environmental requirements) are economic. SEPA does not provide for consideration of
14 economic impacts as part of environmental review. WAC 197-11-444; *Snohomish Co. Property*
15 *Rights Alliance v. Snohomish Co.*, 76 Wn. App. 44, 52, 882 P.2d 807 (1994), *rev'd den.* 125 Wn.
16 2d 1025 (1945); *Town of Concrete v. Skagit Co.*, SHB No. 96-18(1996)(CL XXI.)

17 XXV.

18 The Petitioners do allege some impacts from the Pioneer Cay project on the surrounding
19 environment due primarily to increased pedestrians and residential traffic. Based on the
20
21

evidence presented, the Board is not left with a firm conviction that the City made an error in concluding that these impacts were not more than moderate.

XXVI.

E. Piecemealing (Issue 9)

Petitioners contend that the Pioneer Cay project was impermissibly piecemealed to avoid complete review under both the SMA and SEPA. They base this argument on the fact that a marina was proposed early on in the project, and then dropped, and that the parking garage was not included in the SDP because it is located outside of the 200-foot shoreline area.

XXVII.

The Washington Courts have recognized that a project cannot be divided into segments to avoid compliance with either the SMA or SEPA. *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851-852, 509 P. 2d 390 (1973). This is true even if a portion of the project lies outside of the shoreline area. In *Merkel*, the Court explained that upland clearing and grading could not proceed prior to the issuance of the shoreline permit required for the project for which the clearing and grading were being performed. *Merkel* at 852. *See also* WAC 197-11-060, WAC 197-11-305.

XXVIII.

In this case, no improper segmentation has occurred. Pioneer Cay's original idea to include a marina was dropped from the proposed project. The remainder of the project (the mixed-use building) constitutes a stand-alone project without a marina. The inclusion of the

1 marina is not necessary in the S-8 district to constitute a permitted use. The commercial and
2 residential use of the site can proceed without the marina, and does not depend on future
3 development of the marina for its justification. WAC 197-11-060(3)(b).

4 XXIX.

5 As to the parking garage, it is an integral part of Pioneer Cay's overall development
6 proposal. As such, however, it was properly considered by the City along with the rest of the
7 Pioneer Cay project even though the garage is located outside of the shoreline area. The parking
8 garage has not been allowed to proceed pending the resolution of the SDP for the rest of the
9 project. Therefore, no improper segmentation has occurred.

10 XXX.

11 F. Variance (Issue 10)

12 Petitioners' final contention is that the Pioneer Cay project requires a variance because
13 the project provides only a 10-foot front yard setback. Petitioners contend the applicable TSMP
14 provision requires a 20-foot setback. The regulation, however, provides for flexibility in the
15 front yard setback in certain circumstances.

16 XXXI.

17 TMC 13.10.040.G.2⁹. provides:

18 Front Yard. A minimum front yard having a depth of 20 feet shall be provided, except as
19 set forth below.

20 ⁹ The S-1 District provisions for front yard setbacks are made applicable to the S-8 District (east side of the Thea
21 Foss Waterway) by operation of TMC 13.10.110.H.2.b.

1 Under the following circumstances, in conjunction with the issuance of a Shoreline
2 Substantial Development Permit, elimination of or a lesser front yard setback than set
3 forth above may be authorized, except for residential development, which shall meet the
4 setbacks as stated.

5 The City proceeds to specify the criteria for determining the circumstances in which a
6 reduction in the front yard setback may be authorized. Petitioners do not argue that the specific
7 criteria listed in TSMP 13.10.040.G.2 are not met. Instead their contention is that the quoted
8 provision above does not apply to the Pioneer Cay development SDP at all because, by its own
9 terms, it does not apply to residential development.

10 XXXII.

11 However, the Pioneer Cay project is a “mixed-use” project with both a commercial and
12 residential component. *See* TMC 13.10.030.33 (defining mixed-use projects to mean
13 developments which include a combination of components). Residential use, on the other hand,
14 is defined as a use consisting of “one-family dwellings, apartments, and condominiums.” TMC
15 13.10.030.48. The Pioneer Cay project, with its combination of two stories of commercial use
16 and six stories of residential meets the definition of mixed use. Therefore, the flexibility allowed
17 by TMC 13.10.040.G.2 is applicable.

18 XXXIII.

19 If a project complies with TMC 13.10.040.G.2, it does not require a variance to change
20 the front yard setback. TMC 13.10.040.G.2 expressly states that under specific circumstances
21 “in conjunction with the issuance of a Shoreline Substantial Development Permit” a change or

1 elimination to the front yard setback may be authorized. A change to a setback can always be
2 authorized through the use of a variance, provided the change meets the strict requirements for a
3 variance. See WAC 173-27-170. There would be no purpose in the “special circumstances”
4 exception contained in TMC 13.10.040.G.2 if the City still intended that the applicant be
5 required to obtain a variance. It is a well-recognized principal of statutory construction that
6 regulations should be construed in such a way that no portion is rendered meaningless or
7 superfluous. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156
8 Wn.2d 696, 698, 699, 131 P.3d 905, 907 (2006). The only way to give TMC 13.10.040.G.2
9 meaning and to not make it superfluous is to construe it the way the City did – if the
10 circumstances it describes are met, no variance is required to authorize a change in the front yard
11 setback.

12 XXXIV.

13 Petitioner does not argue that the reduction of the front yard set back for the Pioneer Cay
14 development does not meet the circumstances set out in TMC 13.10.040.G.2. Therefore, the
15 Board concludes the Petitioners have failed to establish that the 10-foot front yard setback
16 requires the issuance of a variance.

17 XXXV.

18 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

19 From the foregoing, the Board issues this:

20 **ORDER**

21 FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
SHB NO. 06-001

1 The shoreline substantial development permit for the Pioneer Cay project, as
2 approved by the City, is affirmed with the following additional conditions:

- 3 1. Pioneer Cay will stripe an area for pedestrians to walk in the edge of the right of way on
4 East "D" street. The City will determine the location and extent of striping.
- 5 2. Pioneer Cay will use STC 40 rated windows, or higher, will install resilient channels on
6 all inside walls of the mixed-use building, and will acoustically line all ducts that connect
7 to the outside.
- 8 3. Pioneer Cay will provide notice on the title to buyers regarding the industrial nature of
9 the area in which they are purchasing, and the likely impacts that industry will have on
10 their use and enjoyment of their property. The notice and waiver should address, at a
11 minimum, the potential for noise and odor. The City Attorney will review and approve
12 the language of the notice.
- 13 4. Pioneer Cay will support, and not oppose, a future resolution by the City adopting higher
14 noise level regulations in the project area that are consistent with the continuing industrial
15 activities in that zoning district.

16 SO ORDERED this 19th day of July 2006.

17 **SHORELINES HEARINGS BOARD**

18 William H. Lynch, Chair

19 Kathleen D. Mix, Member

20 See Concurrence
21 Andrea McNamara Doyle, Member

Judy Wilson, Member

Mary Alyce Burleigh, Member

(Not available for signature)
Mitch Brown, Member

Kay M. Brown
Administrative Appeals Judge

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
SHB NO. 06-001